IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 70

WILLIAM EVERETT REED,

Petitioner,

v.

DR. GEORGE J. BETO, Director, Texas Department of Corrections,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

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Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 83-86) is reported at 343 F. 2d 723 (1965).

Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 7, 1965 (R. 87). Petition for Rehearing (R. 88-89) was denied by the Appellate Court on May 11, 1965 (R. 90). Petition for Writ of Certiorari and Motion for Leave to Proceed In Forma

Pauperis were filed and docketed as Number 268 Misc. on June 8, 1965. On January 31, 1966, the Petition for Writ of Certiorari and the Motion to Proceed In Forma Pauperis were granted by this Court (R. 91). The jurisdiction of this Court rests on 28 U.S.C., Section 1254(1).

Questions Presented

1. Whether Petitioner was denied the right to a fair and impartial trial under the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States, and similar rights guaranteed him under the Constitution of the State of Texas, when the Indictment alleging prior felony convictions was read to the jury and proof thereon was heard by such jury prior to a finding of guilt upon the primary offense.

2. If Petitioner's position be sustained, whether or not the ruling should be applied retroactively.

Statutes Involved

Article 63 of the Texas Penal Code provided as of the dates involved in this case:

"Third conviction of felony

Further, whoever shall have been three times convicted of a felony less than capital shall on such third conviction be in prison for life in the penitentiary."

Article 642, Texas Code of Criminal Procedure of 1925, provided as of the dates in this case:

"Order of proceeding in trial

A jury being impaneled in any criminal action, the cause shall proceed in the following order:

1. The indictment or information shall be read to the jury by the attorney prosecuting.

2. The special pleas, if any, shall be read by the defendant's counsel, and if the plea of not guilty is also relied upon, it shall also be stated.

3. The State's attorney shall state to the jury the nature of the accusation and the facts which are expected to be proved by the State in support thereof.

4. The testimony on the part of the State shall be offered.

5. The nature of the defenses relied upon and the facts expected to be proved in their support shall be stated by defendant's counsel.

6. The testimony on the part of the defendant shall be offered.

7. Rebutting testimony may be offered on the part of each party."

Statement

Petitioner was convicted upon his plea of not guilty before a jury in the Texas Trial Court of the primary offense of burglary with two (2) prior convictions of ordinary felonies. Under Article 63 of the Texas Penal Code of 1925, his punishment was assessed at confinement for life in the penitentiary (R. 39-40). Such conviction was affirmed in *Reed* v. *State,* 353 S. W. 2d 850 (Tex. Crim. App. 1962), and Petitioner is presently in custody under such sentence in the Texas Penitentiary. Thereafter, Petitioner filed his Petition for Writ of Habeas Corpus in the United States District Court for the Southern District

of Texas, Houston Division, on the ground, *inter alia*, that such conviction denied to him due process of law as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States, in that the reading of the allegations of the two (2) prior convictions and proof of the same to the jury, prior to determination of guilt by such jury, deprived him of his right to a fair trial (R. 1-4). The District Court dismissed the Petition for failure to exhaust available State remedies under 28 U.S.C., Section 2254 (R. 75-77). On appeal, the Court of Appeals held, under the special circumstances outlined in its opinion, there was no failure to exhaust such remedies. The cause was affirmed on the merits as being controlled by *Breen* v. *Beto*, 341 F. 2d 96 (5th Cir. 1965) (R. 83-86). It is undisputed that Petitioner was convicted after the jury was informed of Petitioner's prior convictions at the commencement of the trial (R. 39), and such prior convictions were proved to the jury before a finding of guilt (R. 45-59).

Summary of Argument

The reading of the allegations of the prior convictions contained in the Indictment and the proof of such prior convictions, under the authorized and established procedure of Texas, deprived Petitioner of his right to a fair and impartial trial under the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States. The underlying purpose of the habitual offender statutes to protect society from persons persisting in crime do not override the assurance of a fair trial to determine if the accused has indeed so persisted, without extraneous and impermissible consideration of prior and unrelated acts. The decision in *Breen* v. *Beto*, 341 F. 2d 96 (5th Cir. 1965),

projects no valid reason for such overriding, in contrast to the contrary and well reasoned decision in *Lane* v. *Warden, Maryland Penitentiary,* 320 F. 2d 179 (4th Cir. 1963). The application of the *Lane* principle should have retroactive effect. The prejudicial procedure strikes at the heart of the fact-finding process from the beginning of the trial, making it impossible to be tried by an impartial jury, as constitutionally assured.

ARGUMENT

I.

Informing a Jury of an Accused's Prior Conviction Violates Due Process in That It Deprives the Accused of an Impartial Jury.

While the procedure obtaining in this cause has been described as the "common law" procedure, 25 Mont. L. Rev. 250, there is evidence, even prior to the passage of the Previous Convictions Act of England, 6 & 7 Will. IV., c. III. (1836); 24 & 25 Vict. c. 99 (1861), of a possible custom of refraining from informing the jury of such prior acts until after a finding of guilt on the subsequent offense:

> "I never used to allow the jury to know anything of the previous conviction till they had given their opinion on the charge upon which the prisoner was to be tried; because I thought, that, if the jury were aware of the previous conviction it was (to use a common expression) like trying a man with a rope about his neck. However, the Judges have had a meeting on the subject . . . and they held my practice . . . was wrong . . . ." *Rex* v. *Jones,* 6th C. & P. 391, 172 Eng.

Rep. 1290 (1834), as quoted in 14 Temple L. Q. 386, 387, n. 15 (1940).

The overruling of the Judge in *Rex* v. *Jones, supra,* was promptly rectified in England by the passage of the Previous Convictions Act, providing that the accused must be found guilty of the primary offense before the jury can be advised of the prior offenses.

It is basic that an accused is presumed innocent, with the burden falling upon the State to establish guilt by material and relevant evidence. Without such evidence a conviction cannot stand. *Thompson* v. *Louisville,* 362 U.S. 199 (1960). *Irvin* v. *Dowd,* 366 U.S. 717 (1961), re-establishes that the due process clause of the Fourteenth Amendment to the Constitution of the United States guarantees to an accused the right to a fair trial by an impartial jury. The failure to accord a fair hearing violates the minimal standards of due process. *Irvin* v. *Dowd, supra; Re Oliver,* 333 U.S. 257 (1947); *Tumey* v. *Ohio,* 273 U.S. 510 (1927). As stated in *Irvin,* in essence the right to jury trial (provided for by State Constitutions) guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. There can be no due process or equal protection unless such principle remains inviolate.

The reasoning of *Marshall* v. *United States,* 360 U.S. 310 (1959), is that jurors' exposure to newspaper accounts reflecting prior convictions of the accused precludes a fair trial by an impartial jury, and this is so even though the jurors assert they are not prejudiced. While *Marshall* represents an exercise of this Court's supervisory power over Federal Courts, the full thrust of *Marshall* upon the

various States is made apparent through *Irvin*, bringing the matter within constitutional dimensions.

> "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular test and procedure, it is not chained to any ancient and artificial formula." *United States* v. *Wood*, 299 U.S. 123, 145-146 (1936).

A juror cannot be impartial when fixed in his mind is the historical fact that the accused has been previously convicted.

> "A fair trial and a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955).

It is the essence of due process that a fair trial by an impartial jury means a jury untainted by prejudicial evidence or other stimuli. "The right to a fair trial is the right that stands guardian over all other rights." *Dennis* v. *United States*, 339 U.S. 162, 173 (1959), concurring opinion by Mr. Justice Jackson. Not only is that right denied where the jury is prejudiced by newspaper articles or other media, but the denial becomes more patent where the prejudice is imposed by the State of Texas.

> "When a state deprives a person of liberty or property through a hearing held under statutes and circumstances which necessarily interfere with the course of justice, it deprives him of liberty and property without

due process of law." *Tumey* v. *Ohio,* 273 U.S. 510, 511 (1927).

Jackson v. *Denno,* 378 U.S. 368 (1964), is factually analogous. The rationale of *Denno* is that the jury might be impermissibly influenced by a confession found involuntary and thus not properly in evidence. A jury is similarly influenced in its examination of prior convictions, enmeshed with its function to determine guilt or innocence of the current offense.

Perhaps some distinction may be made as to jurisdictional prior offenses constituting elements of the current offense. It is this distinction Respondent failed to appreciate in its attempt to weaken the logic of *Lane* by urging upon this Court *Michelson* v. *United States,* 335 U.S. 469, 482, n. 4 (1948):

> "This [rule] would be subject to some qualifications, as when a prior crime is an *element of the later offense;* for example, at a trial for being an habitual criminal. There are well-established exceptions where evidence as to other transactions or a course of fraudulent conduct is admitted to establish fraudulent interest as an element of the crime charged." (Emphasis added.)

The indulgence in such a distinction is here unnecessary. Under Texas law, prior convictions are not elements of the current offense and Article 63, Texas Penal Code, does not create an offense but, rather, prescribes a more severe punishment. *Beyer* v. *State,* 356 S. W. 2d 436 (Tex. Crim. App. 1962). The same interpretation has been placed upon a companion habitual statute, Article 62, Texas Penal Code. *Brown* v. *State,* 346 S. W. 2d 842 (Tex. Crim. App. 1961).

Respondent is perhaps confused by other repetition statutes, such as the Texas offense of driving while intoxicated, subsequent offense, Article 802(b), Texas Penal Code, in which instance proof of the prior offense is an essential ingredient of the current crime, without which there could be no conviction of the current offense. *Skaggs* v. *State,* 266 S. W. 2d 871 (Tex. Crim. App. 1954). Whether or not, even in such instances, matters of constitutional dimension are encountered is not here necessary to decision.

Admittedly, evidentiary exceptions are made to the universal rule excluding prior criminal acts of an accused, such as prior acts to show intent, identity, motive, plan or design. Such exceptions, however, are born of necessity to prove an issue in a criminal cause, a necessity not here applicable. Even as to such exceptions, undue prejudice flowing therefrom may, on occasion, outweigh the relevance. Stone, *The Rule of Exclusion of Similar Fact Evidence; America,* 51 Harv. L. Rev. 988 (1938); Lacy, *Admissibility of Evidence of Crimes Not Charged in the Indictment,* 31 Ore. L. Rev. 267 (1952).

The apparent purpose of recidivist statutes to protect society from persons who persist in the commission of crime is appreciated. Such statutes are recognized as necessary, though apparently enforced in a limited manner, in dealing with those persisting in crimes of a non-violent or lesser nature calling for punishment as to individual offenses of limited penal terms. Brown, *The Treatment of the Recidivist in the United States,* 23 Canadian Bar Rev. 640 (1945). Such considerations do not however, as apparently urged by Respondent, override the assurance of a fair trial of the accused to determine if he has indeed persisted in the

commission of crime without extraneous and impermissible consideration of prior and unrelated acts.

No logical reason has been advanced to justify the proceeding here questioned. An accused, more familiar with the Texas procedure when colloquially described as the "big bitch", is cognizant of the use, or threat of its use, to obtain pleas of guilty after being fully "advised" by a "cop-out" man from the District Attorney's office of the availability of such proceeding. Legal justification for such recidivist procedure has taken three (3) primary forms. Where, under the law of the jurisdiction, the jury fixes the sentence, as in Texas, the Courts have held the prior offenses must be pleaded and proven before the jury. *Redding* v. *State*, 265 S. W. 2d 811 (Tex. Crim. App. 1954). Other jurisdictions have ruled their statutes require such procedure. *People* v. *Hoerler*, 208 Cal. App. 2d 402, 25 Cal. Rep. 209 (Dist. Ct. App. 1962); *State* v. *Tucker*, 142 W. Va. 830, 98 S. E. 2d 740 (1957). Neither approach precludes a separate hearing after a determination of guilt on the current offense. Some jurisdictions justify the procedure here complained of on the theory that the accused must be accorded notice of proposed enhancement. *State* v. *Compagno*, 125 La. 669, 51 So. 681 (1910); *Palmer* v. *State*, 229 S. W. 2d 174 (Tex. Crim. App. 1950). Again, this does not appear to justify notice to the jury of the prior convictions before the jury verdict as to the current offense. If the procedure is not necessary—why does it linger? One with even limited exposure to the criminal courts has a clear concise answer—it is a prosecutor's darling. With such potent weapon, current weak cases can be won handily or, perhaps more prevalently, guilty pleas can be induced to the current offense.

The inherent unfairness has been recognized in many jurisdictions. Some Courts have changed the procedure by decree. *Heinze* v. *People*, 127 Colo. 54, 253 P. 2d 596 (1953); *State* v. *Johnson*, 86 Idaho 51, 383 P. 2d 326 (1963); *Harris* v. *State*, 369 P. 2d 187 (Okla. Crim. App. 1962); *Commonwealth* v. *Koczwara*, 397 Pa. 527, 155 A. 2d 825 (1959); *Beeler* v. *State*, 206 Tenn. 160, 332 S. W. 2d 203 (1959); *State* v. *Stewart*, 110 Utah 203, 171 P. 2d 383 (1946); *State* v. *Kirkpatrick*, 181 Wash. 313, 43 P. 2d 44 (1935). Prior to the final decision in *Lane*, Maryland revised its procedure by statute, Md. R. P. 713 (1963), and other State Courts have suggested or requested legislative changes. *Oler* v. *State*, 378 S. W. 2d 857 (Tex. Crim. App. 1964); *Higgins* v. *State*, 235 Ark. 153, 357 S. W. 2d 499 (1962). Recently the Arkansas and Tennessee Courts have declared the procedure complained of unconstitutional. *Miller* v. *State*, 239 Ark. 836, 394 S. W. 2d 601 (1965); *Harrison* v. *State*, —— Tenn. ——, 394 S. W. 2d 713 (1965) (prospective ruling); *Cummings* v. *State*, —— Ark. ——, 396 S. W. 2d 298 (1965) (retroactive ruling).

Prior to legislative change on January 1, 1966 (Article 38.01, subsection 1, and Article 37.07, subsection 2(b), Texas Code of Criminal Procedure of 1966), in an attempt to ameliorate the prejudicial situation, the Texas Court ruled the accused would be allowed to stipulate the prior convictions before trial, thus precluding the State from introducing such evidence. *Pitcock* v. *State*, 367 S. W. 2d 864 (Tex. Crim. App. 1963). Thereafter, the Court held that such a stipulation would allow a waiver of the reading of the prejudicial portion of the Indictment. *Ex parte Reyes*, 389 S. W. 2d 804 (Tex. Crim. App. 1964). Under Texas procedure, however, the stipulated facts would still be

required to be submitted to the jury at the end of the trial. 9 Wigmore, Evidence, Section 2594a at 597 (3d Ed. 1940).

While it would appear that the "common-law" procedure has been employed until recently in the majority of jurisdictions, such procedure has been supplanted by a bifurcated proceeding. 40 N.Y.U. L. Rev. 332 (1965); 33 N.Y.U. L. Rev. 210 (1958). The motivating force underlying all change is a frank recognition of a lack of a fair trial.

II.

The Lane Principle Should Be Applied Retroactively.

When an accused is denied the right to a fair and impartial jury, such denial strikes at the very basis of the fact-finding process demanding retroactive application. Such is the effect of this Court's decision in *Irvin* v. *Dowd*, 366 U.S. 717 (1961), a review of the denial of habeas corpus. The distinct function of the constitutional rule demanding an impartial jury is to allow an accused a fair trial. "The theory of the law is that a juror who has formed an opinion cannot be impartial. *Reynolds* v. *United States*, 98 U.S. 145." *Irvin* v. *Dowd, supra,* at 722. To speculate that an accused under the "common-law" procedure could have received a fair trial, touches the observation made by the Third Circuit in *United States ex rel. Scoleri* v. *Banmiller*, 310 F. 2d 720 (1962), that putting out of their minds the knowledge of the prior convictions while determining guilt or innocence would be "a feat of psychological wizardry [which] verges on the impossible even for berobed judges." Pointedly stated, "It is not reasonable to suppose that it could have been accomplished by twelve laymen brought together as a jury." 310 F. 2d 725. Under the habitual

proceeding in this cause, the right to counsel, competent as he may be, is totally ineffective to prevent prejudicial matter from being heard by the jury at the very beginning of the trial, thereby permeating the whole of the trial with a continuing and grave prejudice of a nature that would normally call for a reversal. As concluded in *Lane*, that such information is presented as a matter of historical fact smacks of even greater prejudice. As emphasized in *Johnson and Cassidy* v. *New Jersey*, —— U.S. ——, 34 L.W. 4592 at 4594, 4595, June 20, 1966; in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); and in *Jackson* v. *Denno*, 378 U.S. 368 (1964), this Court concluded "that retroactive application was justified because the rule affected 'the very integrity of the fact-finding process' and averted 'the clear danger of convicting the innocent.'" Concerning ourselves with the underlying consideration announced in *Johnson and Cassidy*, assuming prejudice of constitutional dimensions, what other safeguards in the premises "are available to protect the integrity of the truth-determining process at trial"?

Studies of the use and effect of the recidivist system has been limited. There is some indication that it is applied sparingly, but statistically it does not appear possible to ascertain the extent of usage. Brown, *The Treatment of the Recidivist in the United States*, 23 Canadian Bar Review 640, 658, 659 (1945). For the period ending December 31, 1965, of the twelve thousand eight hundred fifty-four (12,854) inmates in the Texas Department of Corrections, there were five hundred thirty-seven (537) inmates serving life sentences as habitual criminals. (See Appendix A.)

We are concerned here, not with an accused who has allegedly committed the most heinous of crimes. This is

the accused who has committed that crime or crimes which society, on an individual case by case basis, cannot consciously extract a more onerous penalty. The effect of retroactivity, seemingly demanded in trials by partial juries, would appear to touch a smaller number of inmates and would be far less as to convicts here affected than as to the *Gideon* inmates. Here, as in *Gideon,* one could not further claims of innocence or any violation of rights before a jury prejudiced against him. No judgment based upon such a proceeding is reliable. *Linkletter* v. *Walker,* 381 U.S. 618, 639, n. 20 (1965).

"We are born for justice, and right is not the mere arbitrary construction of opinion, but an institution of nature." Cicero, *De Legibus I.,* 10, 28. The tendency to prospective decision may convey that justice is mere utility and yet, by nature, it cannot be so, for "that which is established on account of utility for utility's sake be overturned." *Pro A. Cluentio Oratio,* c. 53, section 146. A holding here must transcend expediency to comport with human conscience. From a pragmatic view there is a concrete danger associated with prospective rulings. To those opposed to the constitutional holdings of this Court, time and delay appear as effective weapons in opposition to change. Thus, individual rights may continue to be trammelled in anticipation of mere prospective rulings. Indeed, it would seem this Court's rulings must be especially directed toward the Texas Appellate Court before the effect of rulings will be here felt. This is illustrated by the Texas refusal to follow this Court's opinion in *Fahy* v. *Connecticut,* 375 U.S. 85 (1963). *Gonzales* v. *State,* 389 S. W. 2d 306 (Tex. Crim. App. 1965). Constitutional pronouncements of this Court should serve to enhance the judging process of the State

judiciary. The course of judicial history in the State Courts reflects in many instances a lack of alertness to a possible change or modification comporting with a more enlightened sense of criminal justice. A certain sense of security may be found in purely prospective holdings of this Court by some State Courts, thus allowing continued confinement of the victims of any onerous process. This sense of security will hardly serve to enhance the judging process at the State level.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

August , 1966.

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